The Central Law Journal.

ST. LOUIS, JULY 13, 1883.

CURRENT TOPICS.

A curious speck of war has arisen between our cotemporaries the *Ohio Law Journal* and the *Virginia Law Journal* in which from being the unwilling and unconscious cause of contention we have suddenly waked to the fact that we are within the line of fire of the first of these adversaries and, by a flank movement of one of them, are threatened with spoliation. The facts are these: We saw, somewhere, some remarks on the subject of the desirability of "Short Opinions," which impressed us as coinciding in views we had previously expressed and we printed them as confirmatory evidence, crediting them at the time to the *Pacific Coast Law Journal* from which we thought we had clipped them. The *Virginia Law Journal* put in a claim, (which we at once admitted, 16 Cent. L. J. 441) at the same time accusing the *Wisconsin Legal News* of similar inadvertence in crediting the same thunder to the *Ohio Law Journal*. Thereupon that journal notwithstanding the peculiar modesty which is said to be characteristic of the people and all the productions of the State manages to speak up for itself in the following emphatic manner:

"A TERRIBLE MUDDLE."

In the *Law Journal* of April 21, 1883, we printed what we proudly supposed was an able article from the gifted pen of the editor-in-chief, entitled 'Short Opinions.'

On May fourth, ult., the CENTRAL LAW JOURNAL did us the honor of copying and commending a large portion thereof, giving due credit as is Mr. Murfree's happy habit.

In the May number of the *Virginia Law Journal*, under the head of 'Miscellany,' our modest suggestions were enlarged upon and in part quoted *verbatim, etc.*, without, however, any credit being given. In fact, the adaptation was chiefly of the argument rather than the words, and no credit was demanded. But the joke comes along later. The same *Virginia Law Journal* for June has the following remarkable article given under its head of 'Miscellany.'

"There is really never any good excuse for typographical errors—those irrepressible children of carelessness—and we dislike to acknowledge them in public. In our editorial of last month on "Short Opinions," we wrote "*leaving*," "*intricate*," and "*absolutely*," and were surprised to find them translated "*having*," "*intimate*," and "*absolute*." Of course in such cases all well regulated people understand that it is in order to abuse the printer. This, however, did not prevent the occurrence of a somewhat singular coincidence. The *Wisconsin Legal News* favored us by copying the article into its columns, errors and all, but credited it to the *Ohio Law Journal*; and the CENTRAL LAW JOURNAL copied with commendation the greater portion of it, kindly correcting the errors, and credited it to the *Pacific Coast Law Journal!* We have looked somewhat anxiously to the O. L. J. and the P. C. L. J., to see if we have been doing a little unconscious pilfering. We plead not guilty. Come, gentleman; what say you? As was said by the clown's, 'it is a little thing, but it is mine own!'

In the state of bewilderment produced by this charge of stealing our own thunder, we can only declare that if that clown's wife was not more certain of the identity of her own little thing than is the *Virginia Law Journal* of the "Short Opinions" we so carefully prepared, then it must have been an extraordinary little thing indeed.

The CENTRAL L. J. did also, on May eighteenth, reproduce the article to which we refer as appearing in the May number of the *Virginia L. J.*, and did give credit to the *Pacific Coast L. J.*, but as we have not seen the *Wisconsin Legal News* we can not say whether that paper took our "Short Opinions" from the *Ohio L. J.* in its virgin acuteness, of from some other paper in its *Virginia* cuteness.

The matter becomes more than ever laughable from the fact that the CENTRAL L. J. sagely remarks that 'the interest of our brethern of the law press in the discussion *awakened by our remarks on the subject of judicial prolixity* seems to be growing at such a rate' etc., etc. The italics we supply to accentuate the complacency of the CENTRAL L. J. in appropriating the entire credit to itself, just as does the V. L. J. in the article quoted by the former.

This is not the first time that a painstaking chicken has laid an egg, and the entire barnyard family, including the old rooster, has cackled over it, while the good chicken cackled very quietly but with the comforting thought that "it is a little thing, but it is mine own."

We can only add that the innocence of the *Virginia L. J.* is not as Lamblike as it ought to be, nor yet as Christianlike as we should expect from law editors."

When we read this it was impossible to restrain a smile at our Ohio neighbor's cool assumption, apparently, that April 21st 1883, the day big with fate, when it published the all important item in question, was the beginning of the world. We laid the article aside, with intention of taking up the cudgels at a convenient season to defend ourselves against the charges of undue self-glorification. But meanwhile the *Virginia Law Journal* with an innate sense of justice which does it much credit, comes to our rescue in its last issue. Therefore, mindful of the maxim of the wise man of old: "Let another man praise thee, and not thine own mouth; a stranger, and not thine own lips," we reproduce what is there said:

"In the matter of Judicial Prolixity, the *Ohio Law Journal* seems to think we are indebted to it for some assistance. This is absurd. We have always care-

fully endeavored to give credit where it was justly due. When our article was written we had forgotten that the *O. L. J.* had said anything on the subject; in fact, we had forgotten the important existence of the *O. L. J.* After the coincidence mentioned in the *Virginia Law Journal* for June, we looked over our exchanges, and now suppose that we must have gotten the incident of the two-line opinion of the Pennsylvania supreme court from the *O. L. J.*; but if we did, the *O. L. J.* can not complain, unless that incident was of its own invention. The assertion that its article was 'in part quoted *verbatim*' by us must have originated in the distressing state of bewilderment to which the *O. L. J.* confesses; it has no foundation in fact. This sad condition may also account for its attempt to share in the credit due the CENTRAL LAW JOURNAL for starting the discussion of Judicial Prolixity. The latter Journal commenced the subject as early as January 26th, ult., and the *O. L. J.* was silent until April 21st. There were, no doubt, some words used by us which were also used by the *O. L. J.*; and inasmuch as the subject was the same, and we both used the English language, this would seem to have been unavoidable—save, perhaps in Ohio. When we enter the field as a *punster* of the legal press we shall be pleased to borrow from the *O. L. J.*, and in that case the quality of the goods will insure proper credit. In that department the *O. L. J.* is supreme, and the more obvious the puns the more brilliant its success."

We do not wish to be understood, however, as claiming to be the first man who ever said that the judges are accustomed to write tediously long opinions, for fear a host of witnesses would arise against us in a long line of sweating and swearing lawyers. We only wish to have it understood that we precipitated the present discussion.

It seems to us, however, that the controversy is begining to assume rather a tart and rigid tone. We are a man of peace, and we earnestly hope there will be no duel. Not only is the weather warm, and all undue excitement injudicions, but we are as little desirous of seeing the practice of journalistic dueling extended to the brothers of the legal press, as a member of the English Cabinet or the Russian Police, of encouraging the development of the resources of science in the manufacture of high-explosives, and for a very similar reason. It is dangerous. At any rate is seems to be so when when conducted on the American plan which we must confess, is in marked contrats to the innocuous French variety, which from time immemorial has been such an unfailing relaxation of the overworked journalists of the "gay capital."

MISTAKE OF A LEGAL RIGHT.

The courts in applying the maxim, *Ignorantia juris neminem excusat*, in the numerous decisions to be found in the books, have given rise to much confusion by confounding the terms ignorance and mistake. But there is a material difference between them and one which should be the means of correcting the abuses that have arisen hitherto.

Ignorance is mistake, but mistake is ignorance and something more. Ignorance is passive and turns away from diligence, while mistake is active in seeking the truth, but errs in acting upon that which it honestly believes to exist, when in truth it has no existence whatever. The one is incapable of proof, while the other is entirely susceptible of it. The consequences of the one reveals no extenuating circumstances; but those of the other are palpable evidence of the existence of something material in governing the action of a party which was unknown to such party at the time of acting, and which, had it been known would have caused a different course of action.

The want of knowledge of something material to the transaction in a particular case is the test to be applied in giving judgment upon it. And the absence of that which is material is not always a pure fact, in considering a given case. But to make it the turning point, the equitable doctrine that no one shall have or retain that which *æquo et bono* does not belong to him, is invoked to authorize the judgment given. And that is the true principle.

Mistake of a legal right has occurred in both executory and executed agreements, and there seems to be no difference, in applying the principle, in trying to enforce the one or seeking to open the other, except, it may be, in a class of cases where money has been paid under an invalid law. But even in those cases equity would not demand a return of money so paid, if in justice it should not be. Moreover, the validity of a law might be tested by one who pays money under it, to another voluntarily, because he is presumed to know the law, and the fact of its invalidity is equally within the knowledge of both parties to the transaction.

But where all the facts are within the knowledge of one party, but some material

fact is unknown to the other, a promise by the latter to pay money to, or perform some agreement made with the former will not be enforced.[1] Aside from fraud, the evidence of the case might reveal no liability existing against the promissor at the time of his undertaking; a fact capable of proof and one, which, in itself, shows the want of mutuality, as in the Merrimack Co. Bank v. Brown, where defendant promised to pay a promissory note on which his liability as surety had been discharged, by the holder having given time to the principal, and by which it appears that no consideration existed for the promise. Haynes v. Thom is a similar case, where the defendant, being a "receiptor" for attached property gave a promissory note to satisfy an execution which the plaintiff failed to satisfy by levying upon the property before dissolution of attachment, but after dissolution and before giving the note, the defendant offered to deliver the property to the officer, who refused to take it. Here the defendant did not know that his obligation to deliver the property to the officer, had ceased when he gave the note to the plaintiff's attorney. And the same is true of Warder v. Clark, where it is said that, "Where one through a mistake of law acknowledges himself under an obligation which the law will not impose upon him, he shall not be bound thereby." The implied promise of the plaintiff having failed, there is nothing to support the express promise of the defendant to perform his undertaking. But where the facts are within the means of knowledge of the party promising to perform some agreement on his part, he is not obliged to ascertain them.[2] But in the early case of Bilbie v. Lumley, which was as action to recover money paid upon a policy of insurance, brought by the insurer, it was held that he had means of knowledge of the facts which he claimed disentitled the assured, because he had a letter before him at the time the insurance was effected which contained them. Later, the court of Exchequer, declined to apply the principle to the case of Kelly v. Solair, in which money paid upon an insurance policy, which had "lapsed," was recovered. The insured had failed through inadvertence to pay the regular premium when due, and insurer then marked the policy as having lapsed. Subsequently the policy was paid through forgetfulness of the above fact. In delivering judgment, Lord Abinger said: "I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment." To the same effect is Leggett v. Waite.

Therefore, means of knowledge will not preclude a party from recovering money paid under a mistake, and forgetfulness does not affect the conduct of the prudent man. This seems to be a reasonable rule. In Bell v. Gardiner it was held that a plea, otherwise good, was not bad because it failed to alleged means of knowledge not within the possession of the defendant. And Shepley, J., in Norton v. Marden, says: "But the means of knowledge which the law requires are such, as the party may avail himself of as then present without calling to his aid other assistence."

But where an agreement is entered into and the defendant refuses to perform because he has discovered an error which he and the plaintiff were equally ignorant of at the time of the engagement, performance will not be enforced. And if money has been paid upon the agreement, it can be recovered.[3]

[1] Leonard v. Leonard, 1 Ball & Beatty, 180; Warder v. Tucker, 7 Mass. 449; May v. Coffin, 4 Mass. 347; Haynes v. Thom, 28 N. H. 346; Freeman v. Boynton, 7 Mass. 483; Goodall v. Dolley, 1 D. & E. 712; Merrimack Co. Bank v. Brown, 12 N. H. 320; Kidder v. Blake, 45 N. H. 530; West v. Ashdown, 1 Bing. 163; Stewart v. Ahrenfield, 4 Denio 189; Donaldson v. Means, 4 Dallas 109; Garland v. Salun Bank, 9 Mass. 408; Kelley v. Brown, 5 Gray. 108; Forman v. Wright, 11 C. B. 481; Northrup's Exrs. v. Graves, 19 Conn. 548; Tiffany v. Johnson, 27 Miss. 227; Guild v. Baldridge, 2 Swan. (Tenn.) 295; Anchor v. Bank etc., Dong. 648; Ocking v. Pratt, 1 Ves. Sen. 400; evidence of *suppressio vert* not quite clear in this case.

[2] Bilbie v. Lumley, 2 East. 469; Kelley v. Solari, 9 M. & W. 54; Leggett v. Waite, 5 Cowen 195; Bell v. Gardiner, 4 Scott, N. R. 621; Lucas v. Worswick, 1 Moo. & Rob. 293; Guild v. Baldridge, *supra*; Rutherord v. McIvor, 21 Ala. 750; Norton v. Marden, 15 Maine 45; Allston v. Richardson, 51 Tex. 1; Vide, West v. Houston, 4 Harrington, 170; which is doubtful.

[3] Lawrence v. Beaublen, 2 Bayl. (S. C.) 623; Kay v. Dutton, 7 Man. & Gr. 807; Cabst v. Hoskins, 3 Tick. 83; Boston v. Capen, 7 Cush. 116; Higgins v. Strong, 4 Blackf. 182; Bell v. Gardiner, *supra*; Lansdown v. Lansdown, Moseley, 364; Stedwell v. Anderson, 21 Conn. 139; Haven v. Foster, 9 Pick. 112; Offutt v. Parrott, 1 Cranch. C. C. 154; Perkins v. Gay, 3 S. & R. 327; Culbreath v. Culbreath, 7 Geo. 64; Cooper v. Phipps, 2 A. L. 149; Hopkins v. Mazyck, 1 Hill's Ch. (S. C.) 242; Lownes v. Chishohn, 2 McCord's Ch. 455; Milnes v. Duncan, 6 B. & C. 671; Burr v. Vedder, 3 Wend. 422; Boyer v. Park, 2 Denio 107; Vest v. Weir,

Upon the point of enforcing an agreement, the case of Lawrence v. Beaubien is a leading authority, ably discussed and well considered. The defendant was a devisee and had been advised by counsel that the land devised to him would descend to the testator's heir at law in the same manner as if the testator had died intestate. Being desirous of holding the land, the defendant gave a bond for a stipulated sum to the heir at law for a release of his right, title and interest in the land, and entered upon it and occupied it from the date of the release to the time the action was brought against him upon the bond by the assignee thereof. Subsequent to the date of the release the defendant bought from the State all the title it had to the same property under certain laws by which it had escheated to the State. And it was decided that the bond was given under a mistake of a legal right, and an action upon it could not be maintained. Mr. Justice Johnson in giving the opinion of the court, says: "It is clear that the bond was not intended as a gratuity; nor did the defendant, after taking advice of counsel, intend it as a price for the fee simple of the land. Therefore the error was palpable and quite susceptible of proof.

Here the defendant could in no wise be remitted to negligence, and it is clear that he and the heir at law supposed the latter to have some interest in the land, when in truth he had none. The mistake consisted in the fact that there was no subject matter existing at the time of the transaction. The defendant had never received anything for the price named in the bond, because as a matter of fact the obliger had nothing to release, and in equity, even, was not entitled to have performace of the agreement.

The same objection arose in the case of Kay v. Dutton. The plaintiff, there, having an eqitable lien upon land on account of money paid by him as surety, was requested by the defendant to release to him his claim upon the property and defendant would pay the indebtedness to the plaintiff out of sales and rents from the same; whereupon a deed of release was given; but the lien was reserved in the deed. Consequently there was nothing released and no consideration for the promise. Moreover, the plaintiff was in no wise injured.

In the case of Culbraith v. Culbraith, which was where an administrator brought an action against some of the heirs of his intestate to recover money had and received to his use. In making a distribution of the estate, he had under a misapprehension of the law, excluded the children of a deceased child, and they had subsequently recovered from him their portion of the estate. He was allowed to recover back money as having been paid under a mistake of law, because it would not have compelled him to pay to the defendants the sum recovered.

The administrator had not taken the advice of counsel, but the omission to do so does not appear to be negligence, for it is eliminatad as an element in determinining ordinary prudence.[4]

But the act of the administrator was shown to be an error which was latent and capable of proof. A state of things was supposed to exist, but in reality it was not the true one. And certainly to deny a recovery in such a case is simply to pervert justice or misapply the true principle.

In the above case, it is certain that the plaintiff did not intend to make some of the distributees a present, and it is quite clear that the mistake occurred without the limits of required diligence, to his injury.

Now, in the first class of cases, *suppressio veri* appears, and in the second class it is not aided in its purpose by that degree of diligence it would enforce. But, in the third it is not present, and its place is filled by error. And if error creeps in where it is plain that it could not have been within the comprehension of an honest intention that it should, justice requires that it be corrected. Beyond this point, the maxim *ignorantia legis neminem excusat* may be made available as a legal principle, because the legal presumption here asserts itself. And, if one knows the facts, he is bound to know the legal conclusion to be deduced from them, and cannot set up his ignorance of it to avoid his acts.

At this point the case of Stevens v. Lynch[5]

4 Blackf. 136; United States v. Bartlett, Davels, 19; Bize v. Dickason, 1 T. R. 285; Turner v. Turner, 1 Ch. R. 154; Bingham v. Bingham, 1 Ves. Sen. 126; Norton v. Marden, *supra*; Sherman v. Barnard, 19 Barb. 291; *Contra*. Brisbane v. Dacres, 5 Taunt. 143.

4 Norton v. Marden, *supra*.

5 12 East, 38.

comes up. The defendant, the drawer of a bill of exchange, knowing that time had been given to the acceptor by the plaintiff, promised him to pay the bill; but at the trial set up his discharge by operation of law as a defense, and it was denied.

Aside from the question of waiver, the abandonment of his claim by the plaintiff against the acceptor would be a consideration for the promise of the defendant. His liability had an existence, but it had been terminated, and it is fairly inferred that the plaintiff made a claim upon him, and if he voluntarily recognized it by a promise, the transaction was in the nature of a compromise. The defendant believed himself liable; but the presumption is that he knew the contrary. This seems to imply a doubt. But it is believed that where one makes an agreement based upon a doubt as to his right, he will be bound to perform it. Or if he pay money voluntarily knowing all the facts, he cannot recover it, on account of the legal presumption.

In the case of Rogers v. Ingham,[6] the court refused to permit the plaintiff to recover money paid by her trustee to the defendant, because she had assented to the payment knowing all the facts, and concerning which both parties had had the advice of the same counsel as to their respective rights under the will giving each a legacy, and out of which will the trouble came. Therefore money paid with a full knowledge of all the facts concerning the payment, although it may be under a mistake of law, yet it cannot be recovered.[7]

In Mowatt v. Wright,[8] the plaintiffs brought an action of *assumpsit* against the defendant to recover $1,000 which they had paid her for a release of her dower in property which she had, as a matter of fact, released thirty-seven years before. It appeared that the defendant had made considerable inquiry concerning the property, because she had no recollection that her husband ever owned it. Shortly after the date of the later release the earlier one was discovered.

The plaintiffs were advised that there was reason to believe that the earlier release existed, and the defendant was advised by counsel to compromise, because of learning that an adverse title would be set up. And a compromise was effected and the matter was settled by a payment of the above amount and giving of a release. The question submitted to the jury was whether or not defendant's claim of dower was fraudulent. But they found a verdict for the defendant, which the full court refused to set aside.

In delivering the opinion of the court, Savage, C. J., says: "I cannot consider this a case of mistake of fact or of law. Mrs. Wright brought suits for a claim which she thought well founded. The defendants believed there was a defense, but they could not produce the evidence of it, like the case of a lost receipt; they therefore paid a sum of money, as the easiest and cheapest way of settling a claim. It is a voluntary payment, though they would not have made it, could they have produced the evidence of their title at the time. It is now too late to call the settlement in question."

The parties were equally cognizant of the fact which would have settled the question, but it was not a present fact beyond a doubt, at the time of the compromise. The settlement was the basis for the agreement to compromise. The claim had no foundation in law, but there was a *quid pro quo* in the agreement, and that was the ground for sustaining it.[9] But, of course, fraud is to be ex-

[6] 3 Q. B. Div., 351.

[7] Mowatt v. Wright, 1 Wend 355; Clarke v. Dutcher, 9 Cow. 674; Hubbard v. Martin, 8 Yerg. 498; Jones v. Watkins, 1 Stew. (Ala.) 81; Etting v. Scott, 2 Johns. 157; Evans v. Gale, 17 N. H. 573; Ladd v. Kinney, 2 N. H. 341; Leigh v. Stuart, 2 Leigh, 76; United States v. Clement, Crabbe 499; Cahaba v. Burnett, 34 Ala. 400; Brumigin v. Tillinghast, 18 Cal. 265; Bissell v. Edwards, 5 Day 94; Norris v. Blethen, 19 Maine 348; Johnson v. McGinness, 1 Oreg. 292; Renard v. Fielder, 3 Duer 318; Brown v. Rich, 40 Barb. 28; Rawson v. Porter, 9 Greenl. 119; Fellows v. School Dist. 39 Me. 559; Elliott v. Swartwout, 10 Peb. 137; Marietta v. Slocum, 6 Ohio St. 471; Smith v. Smith, 36 Geo. 184; Mayor etc. v. Lefferman, 4 Gill 425; Natcher v. Natcher, 47 Pa. St. 496; Robinson v. Charleston, 2 Rich. (s. c.) 317; Eoff v. Clay, 9 Mo. App. 176; Hiler v. Hiler, 35 Ohio St. 645; Stewart v. Stewart, 6 Cl. & Fin. 911, and note to syllabus; and notes to Stapelton v. Stapelton, 3 L. C. Eq. (3d. Am. Ed.); Downs v. Donelly, 5 Ind. 496; Morris v. Tarin, 1 Dallas 147; Speise v. McCoy, 6 W. & S. 485; Hall v. Schultz, 4 Johns. 240; Bailey v. Wilson, 1 Dev. & B., 182; McArthur v. Luce, 43 Mich. 435; Holmes v. Lucas Co. 53 Iowa 311.

[8] *Supra.*

[9] Benson v. Monroe, 7 Cush. 125; Cook v. Wright, 1 B. & S. 559; Allis v. Billings, 2 Cush. 25; Longridge v. Dorville, 5 B. & Ald. 117; Cooper v. Parker, 15 Com. B. 822; Calisher v. Bischoffsheim, L. R. 3 Q. B. 449; Oxford v. Barelly, 20 Weekly Rep. 504.

cluded as an element in this class of cases. If a plaintiff *bona fide* believes he has a cause of action against the defendant and brings it, and the latter or some other person makes a promise to the plaintiff to pay a sum of money if he will stop or forbear legal proceedings, the promise will be enforced, even though the claim has no foundation and is unjustly made. The defendant fears legal proceedings and promises to do something to have them arrested; and that is enough to make out a binding obligation. And it makes no difference if the defendant protests.[10] He knows all the facts and should contest the claim of the plaintiff.

The last two classes of cases do not come within the equitable doctrine above mentioned, but they may by comparison serve the purpose to show more clearly where the line which separates them from the other is. But in most cases of mistake, it has appeared that error consists in some element necessary to a contract which was never present to perfect a binding obligation; while those where ignorance of the law is only shown, all the elements of a contract appear from the facts in evidence. And in both of them a *bona fide* intention negatives the idea of fraud.

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[10] Benson v. Monroe, *supra*.

CRIMINAL ATTEMPTS.

I.

It will be remembered that in the recent case of The Queen v. Delaney, mention was particularly made of the then pending case of The Queen v. Brown,[1] in which similar questions in reference to the law of criminal attempts were involved. The Queen v. Brown has now been decided, and is certainly worthy of careful attention. Indeed, the whole doctrine governing the law in question is fraught with extreme interest, and has formed the subject of much controversy among jurists. Geyer, one of the most authoritative German jurists, has devoted a good deal of consideration to the subject in a work published last year (Holz. Enc.), and in his summary the following positions are taken, as presented in a paper in the *Criminal Law Magazine* (Amer.) of January last, by Dr. F. Wharton, in whose learned work on Criminal Law, also, the subject is elaborately examined:—"1. Preparations.—Preparations are only indictable, according to Geyer, when they are got up for the purpose of committing specific crime. This must, according to most European codes, appear in order to sustain a conviction; and to this I may add—though this point is not admitted by Geyer—that, to make an attempt penal, it must be such a movement, directed towards the consumation of a crime, as would apparently end, if not extraneously interrupted, in such consummation. Otherwise, the area of crimes would be dangerously increased. Few 'preparations' can be conceived of, which could not be made use of, as instruments of crime; and to say that an intent to commit a crime is sufficient to convict one who has made any such preparations, is virtually to say that there may be convictions for the bare intent. It is better to say that there is to be no conviction unless the preparations were such as to be likely to end, unless there were an extraneous interruption, in a consummated crime which the parties intended to effect. 2. Unsuitable means.—The position taken by Geyer, following in this repect recent German codes, is that if the means are absolutely unsuitable there should be no conviction. This view no doubt obtains in this country, in cases where the means are not absolutely but apparently unsuitable. But to require the test of absolute unsuitability would be unduly to limit the indictability of attempts. Of what means can we say that they are absolutely capable of producing a particular result? What poison can we be sure will not, in the person for whom it is prepared, find a system so tempered by antidotes as to resist the effects? How can we tell that a particular wound will be deadly, or that it may not be warded off by armour worn by the party assailed? This is possible, and the best test, therefore, would be that of apparent adaptability. This would exclude the case put by Geyer of an attempt to kill by sorcery. But it would not exclude cases in which a gun is fired, in which, at the moment of firing, the powder turns out to be wet; or in which poison has been given,

[1] These defendants were indicted for the attempted assassination of Mr. Justice Lawson in Dublin.

whose strength has been so weakened (this being unknown to the accused party) that it can have no fatal effect. It is also to be observed that if the instrument used is one apparently fitted to injure, the effect on the public peace and on the party assaulted is the same as if the instrument was absolutely fitted to injure. And this has been held to be the law in this country with regard to assaults. An assault, it has been repeatedly ruled, when apparently fitted to do harm if pressed to a battery, does not cease to be indictable because it turns out that no battery could have been effected. And a similar distinction should be taken as to attempts. 3. Unsuitable object.—It is also maintained by Geyer that when the object is unsuitable, i. e., when it is an object on which the intended wrong could not have been perpetrated, then the act complained of is not an attempt to effect the object in question. A, to take the illustration given by him, intends to kill B, but in execution of this intent, shoots at a dead body, which he mistakes for B. Now, supposing that this was a case in which, apparently as well as actually, the object was one on which the attempt could not have been consummated, we may agree in holding with Geyer that the offense could not be called an attempt to kill A. But suppose that the attempt was apparently likely to succeed, is the same conclusion to be reached? Ought we not, in such case, to take the same distinction as is made in respect to means, and to hold that where the object is apparently one on which the offense could be consummated, then an attempt to perpetrate the offense on such an object is indictable? A, for instance, intends to assassinate B, and lurks in a street, through which B's carriage is to pass, and then shoots at the carriage at a time when he thinks B is in it. B, however, is not in it, but it may be, in his place, a bundle of clothes. But this A does not know at the time the gun is discharged, nor is it apparent to other people that B is not in the carriage. And if the distinction above taken with regard to unsuitable means be good, it is an indictable offense to attempt to commit a crime on an object which, though not actually, is apparently the object the perpetrator intended to injure. This distinction is applied in an English case, which I have elsewhere discussed, in which it was held that the fact that a woman was not with child is no defense to an indictment for an attempt to commit an abortion on her person. The truth is, if we reject the test of apparent susceptibility, and introduce in its place that of absolute susceptibility, we will encounter interminable difficulties. It is impossible to say of anyone that a shot would inevitably take effect on him, or that he would certainly yield to a particular poison. If so, it is better in respect to attempts, as is the case with assaults, to take the test of apparent as distinguished from actual adaptability or susceptibitity. 4. Little offenses.—We have, in respect to little offenses, e. g., offenses which are not *mala in se*, but are made indictable by statute on police grounds—the position broadly taken taken by Geyer in the treatise already noticed—that as to such offenses the doctrine of attempts does not apply, and hence that it is not in itself an offense to attempt such minor offenses. This seems to be the view generally held in Germany, and there is a good deal to commend it. In the first place an offense must be of a certain magnitude to make it the object of attempts and accessoryships. A thing must be of a certain degree or size to make it cognizable at a distance; and if, in addition to its smallness, it is as easy to execute a particular little wrong as to attempt it, the attempt would be an absurdity, for which it would be irrational to indict. In the second place, the wheels of police prosecutions would be clogged if attempts to commit offenses of this class were indictable. The selling of whiskey by retail is made in many States indictable. If, in such States, it was ruled to be indictable to attempt such sales, not only would a new and erroneous mass of offenses be created, which would choke the courts, but when the vendee in such cases was called as a witness he could refuse to answer, on the ground that to agree to buy was to take part in, if not attempt, a sale. Our courts, however, have negatived this claim, and have held that the vendee of illicit drinks is not privileged because he is not indictable. The reason given for this, that the law which makes an accessory indictable does not apply to minor offenses not *mala in se*, applies as logically to attempts as it does to accessoryships; and the public convenience of making such application is manifest. Not only do we thus keep

out of the courts many cases which ought not to be tried, but in cases which ought to be tried we obtain evidence we would otherwise lose. If we make all persons in any way encouraging such offenses indictable, we would subject whole sections of the community to indictment. And as all parties in any way promoting or encouraging such sales would be indictable, no such parties could be compelled to answer. The consequence of thus extending indictments to everybody would be to relieve everybody from prosecution. It is not so with great offenses. Great offenses cannot ordinarily be committed without drawing within the range of their observers numerous parties who have no part or lot in them. As to such offenses, there is, therefore, no processual reason why we should not maintain the old and salutary rules which make attempts indictable. It is otherwise, however, as to minor offenses not *mala in se*, the application of the law of attempts to which is as irrational as it is convenient."—*Irish Law Times.*

MORTGAGE — STIPULATION FOR ATTORNEY'S FEE — CONTRACT.

BURNS v. SCOGGIN.

United States Circuit Court, District of Oregon, June 20, 1883.

1. A stipulation in a mortgage that, if suit is brought to enforce it, the mortgagor will pay the mortgagee a reasonable attorney fee for conducting such suit, is valid and will be enforced by the court.

2. A mortgage for $30,000 in round numbers contained a stipulation that to save the mortgagee "harmless," in case he was compelled to bring suit to enforce the mortgage, the mortgagor would pay him an attorney fee of 10 per centum on the amount due thereon: *Held*, 1. That the real purpose of the stipulation was to secure the mortgagee in the repayment of a reasonable attorney fee in enforcing the mortgage by legal proceedings, not exceeding 10 per centum of the amount due thereon. 2. That the amount of such fee depends upon the labor and responsibility involved in the suit: and if the amount fixed in the stipulation, due regard being had to the nature of the service, is exorbitant, the court will not enforce it only so far as, under the circumstances, may appear reasonable. 3. That no defense being made to said suit, the sum of $500 is a sufficient attorney fee for conducting the same.

C. J. McDougall and *J. M. Bower*, for the plaintiff; *John Catlin* and *T. B. Handley*, for the defendants.

DEADY, J., delivered the opinion of the court:

The plaintiff, a subject of the Queen of Great Britain and Ireland, brings this suit against the defendants, W. G. Scoggin and A. E. Scoggin, his wife, citizens of Oregon, to enforce the lien of a mortgage given by said defendants on February 24, 1882, upon certain tracts of land situated in Washington County, Oregon, and containing in all about 1454 acres, to secure the payment of four promissory notes made and delivered by said W. G. Scoggin to the plaintiff on said day, one for $24,000, payable on December 31, 1884, with interest at the rate of 10 per centum per annum from and after maturity; the same being the amount then loaned to said Scoggin by the plaintiff. The other three were given for the interest to become due on said loan, as follows: One for $1,856, payable on December 1, 1882, with interest at the rate of 10 per centum from and after maturity, and the other two for $2,160 each, payable on December 1, 1883, and December 1, 1884, with like interest after maturity.

The mortgage contained a clause giving the plaintiff the right to declare all the notes due whenever default was made in the payment of either of them. Default was made in the payment of the first interest note, and on December 30, 1882, the plaintiff brought this suit to compel the payment of all the first and second notes by a sale of the mortgaged premises. The mortgage also contained a stipulation that for the "purpose of holding the defendant harmless and securing him against being put to any cost or expense by reason of having to foreclose said mortgage, that there should be taxed as part of the cost of such foreclosure proceeding at the commencement of the suit to foreclose, as and for the benefit of the attorney or attorneys for the plaintiff in such suit, an attorney fee of 10 per centum on the whole amount due on said notes and mortgage."

The bill alleges that this suit is necessarily brought "to collect said sums of money," and "said attorney fee of ten per centum on the whole amount due on said notes has been earned, and is due according to the conditions of the mortgage;" and concludes with a prayer that the same, amounting in round numbers to $2,700, may be paid out of the proceeds of the sale of the premises.

The defendant, W. Scoggin, answered the bill, admitting the allegations therein as to the execution of the mortgage and the stipulation therein giving the plaintiff the right to declare all the notes due and for the payment of an attorney fee, but "alleges that ten per centum upon the whole amount now due and unpaid upon said notes is exorbitant; and that the defendants ought not to be required to pay the same, nor any greater sum than $500," which is ample compensation for foreclosing this mortgage; that said ten per centum is for the benefit of the plaintiff's attorney and not the plaintiff, and therefore it is without consideration.

To this answer the plaintiff filed a formal replication. Afterwards the case was heard upon

the pleadings and a stipulation filed June 4, 1883, to the effect that "the court may find whether or not the plaintiff is entitled to recover an attorney fee as claimed in the bill;" and whether the same "is unreasonable or unjust," and if so, what amount should be allowed," and the court shall of its own knowledge and the practice of the courts determine the amount of the attorney fee in case the same is reduced."

In Wilson S. M. Co. v. Moreno, 6 Saw. 35, and Bank of British N. A v. Ellis, Id. 104, this court held that an agreement by the maker of a promissory note to pay the holder a reasonable attorney fee in case the same was not paid at maturity, and had to be collected by law, was valid, and would be enforced in an action upon such note. And for the same reason, such a stipulation is valid in a mortgage; and so it has been generally held. Jones on Mortgages, secs. 359, 1606; Cox v. Smith, 1 Nev. 172; McLane v. Abrams, 2 Id. 208.

But there are some peculiar features in the stipulation concerning the attorney fee in this mortgage. For instance, the fee is to be taxed as a part of the cost of the proceedings, "at the commencement of the suit," as and for the benefit of the attorney for the plaintiff." Counsel for the defendant insist with much plausibility (1), that as costs are never taxed until the end of a suit, because it can not be known until the judgment of the court is announced who is to pay them, that this stipulation is void for uncertainty, if not absurdity; and (2), that as the fee is given, not to the plaintiff who incurs the expense, but his attorney, the promise to pay it is without consideration and void. But I think the court ought to overlook these verbal inaccuracies, and interpret the contract as the parties evidently understood it; that is, as a promise by the mortgagor to pay the mortgagee in case suit was commenced to enforce the mortgage, an attorney fee in such manner and time as the final decree of the court may direct. But the validity of the contract being admitted, counsel for the plaintiff contend that the amount of the fee has been fixed by the contract of the parties, and can not be reduced by the court except upon proof of fraud. But this contract is in most respects a peculiar one. It is made between a borrower and lender at the moment when the want of the latter often puts him in the power of the former, for a payment in the nature of a penalty, with little if any expectation on the part of the borrower, that the contingency upon which it is to become operative will ever happen. If not a mere cover for usury, it, in effect, concerns the amount of compensation to be paid to an officer of this court for professional services herein, by the adverse party as a substitute for his common law "costs." Such a contract is, in some sense, under the power of the court, and ought not to be enforced by it, unless it plainly appears to be reasonable and just.

As was said in Wilson S. M. Co. v. Moreno, *supra*, "when the fee is so large as to suggest that it is a mere device to secure illegal interest or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought, probably, upon slight additional evidence to that effect, refuse to allow it, or reduce it to a reasonable sum. Borrowers and lenders seldom deal on equal terms, and the necessities of the former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment of the charges and penalties stipulated for in case of failure. It would, then, be better if these stipulations were not made for a fixed sum or percentage, but rather for such sums as the court, under all circumstances, might judge reasonable and right. In this way, regard might be had to the nature and value of the services actually rendered by the attorney. Where the judgment is obtained without opposition on the part of the debtor, as is often the case, the fee should be less than when it is obtained against such opposition."

What, then, is the nature and value of the services performed and to be performed by the attorney or the plaintiff in this case? The defendants have done nothing to enhance the labor and responsibility of this proceeding. No subsequent mortgage has been made of the premises or judgment suffered that might be a lien upon them, and then compel the plaintiff to incur the expense and trouble of making additional parties to the bill.

No opposition has been made to the enforcement of the mortgage, and all that the plaintiff is required to do to enable him to collect his debt is simply to prepare and file a bill, and in due time take a decree of sale and distribution of the proceeds for want of an answer thereto. This service is quite simple, and involves only the discharge of routine duties, for the most part merely clerical. Of course the matter requires reasonable accuracy and attention to detail—such as dates, amounts and description of property—while the comparative large sum involved adds to the responsibility and anxiety of conducting the proceedings to a successful determinatton.

The case of Walker v. Teal, 7 Or. 180, was a suit to enforce a mortgage for over $100,000, in which the claim of the plaintiff was vigorously contested in the circuit and supreme courts. Judge Boise, sitting in the circuit court, allowed the plaintiff an attorney fee of $2,500, and the supreme court tacitly approved it. In this State a judge of the circuit or supreme court is paid a salary of $2,000 a year. His duties are usually more onerous and responsible than those of the attorney who conducts a case before him. And although his salary is generally regarded by the bar and business men of the community as grossly inadequate to the service and the position, yet in estimating the value of an attorney's services from a judicial knowledge of such matters, it is proper to take into consideration the compensation provided by law for judicial services. But tried by any standard of which I have knowl-

edge, or instances within my observation and experience, $2,700 is an exorbitant fee for the conduct of such a case as this—and so exorbitant and out of all proportion to the true or conventional value of the attorney's service that no court would enforce its payment unless compelled to.

The true intent and purpose of the provision in the mortgage concerning the attorney fee is well expressed therein, as being for the purpose of holding the plaintiff "harmless" from the "cost and expense" of a suit to enforce the mortgage, if necessary; and the specification of ten per centum on the amount recovered ought to be regarded merely as the maximum of this undertaking. It might be that the litigation in such suit, in this and the supreme court, to which it may be taken by appeal, would be such as necessarially to put the plaintiff to the expense of $2,700 for the services of attorneys. But in any event he ought not to ask or be allowed more than enough to cover his reasonable expenses in this respect—enough to save him "harmless." What, then, could the plaintiff employ an attorney of average ability and integrity for, to conduct the suit in this court, there being no occasion for or right to an appeal.

In Daly v. Maitland, 88 Pa. St. 384 the mortgage was for $14,000, and the stipulation gave an attorney fee of five per cennum of this amount. The court declared this to be unreasonable and suggested that two per centum was ample. I am quite certain that the plaintiff could have his choice of this bar to conduct this suit through this court without a defense being made thereto, for the sum which the defendant now offers to allow him—$500. I think this is a very liberal compensation for the service, and therefore limit the attorney fee to that amount.

The plaintiff is entitled to a decree for the sale of the mortgaged premises and the application of the proceeds to the payment of his debt and the costs of the suit, including $500 as an attorney fee, less the costs incident to this controversy concerning the attorney fee, for which the defendant, W. G. Scoggin, is entitled to a decree against the plaintiff.

CRIMINAL NEGLIGENCE — BRANDISHING REVOLVER—MANSLAUGHTER.

STATE v. EMERY.

Supreme Court of Missouri, June, 1883.

It is culpable negligence to brandish a loaded revolver in a saloon, whereby the lives of the persons therein are endangered, and the person by whose negligence a pistol is unintentionally discharged, resulting in the death of another, is rightly convicted of manslaughter in the fourth degree.

Appeal from Randolph Circuit Court.

SHERWOOD, C. J., delivered the opinion of the court:

The defendant was indicted for murder in the second degree. On the trial he was convicted of a less offense, to-wit, manslaughter in the fourth degree, and his punishment assessed at two years in the penitentiary. The evidence shows that the defendant was brandishing a self-cocking and self-loading revolver in his saloon, endangering the lives of whoever were there. He was warned of the danger of such actions, and once when his pistol dropped on the counter a bystander picked it up and put it in his pocket, but on defendant's promise to put the pistol up it was returned to him. In a few moments afterwards, however, while flourishing the pistol again it was discharged, resulting in the death of Hammond, a friend, it seems, of defendant, who had just come into the saloon.

The statute provides: "Every other killing of a human being, by the act, procurement or culpable negligence of another, which would be manslaughter at common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree." Rev. Stats. 1879, sec. 1250.

The first and sixth instruction given for the State correctly declare the law, and taken altogether announce this doctrine. That in order to find a person guilty of manslaughter in the fourth degree it is sufficient to show that the shooting, though unintentionally done, was the result of negligence in handling firearms, indicating on the part of such person a carelessness or recklessness incompatible with a proper regard for human life. Mr. Bishop says "there is little distinction, except in degree, between a positive will to do a wrong and an indifference whether wrong is done or not, therefore carelessness, is criminal."

Thus, if a person by careless and furious driving unintentionally run over another and kill him, it will be manslaughter; or if one in command of a steamboat by negligence or carelessness unintentionally run down a boat, and a person therein is thereby drowned, the act is manslaughter. 1 Bishop Crim. Law, secs. 313, 314, and cases cited. Or if a person points a gun without examining whether it is loaded or not, and it happens to be loaded and death results, he is guilty of negligence and manslaughter. Reg. v. Jones, 12 Cox C. C. 628. So also if death ensues from discharging a loaded gun at night into a public highway, whether any person were in sight or not, the act being one of gross carelessness, calculated to endanger the lives of persons passing along the street. People v. Fuller, 2 Parker Crim. Rep. 16.

In another case a revolver was found in the road with one load in it, six months thereafter repeated attempts failed to discharge it or to remove the load; over four years thereafter the defendant, in sport, endeavoring to frighten a woman with the revolver, it was discharged, and killed her, and the defendant was held rightly convicted of manslaughter. State v. Hardie, 47 Iowa. 647.

These authorities abundantly support the instructions we have commented on, none of them show such a degree of carelessness and disregard of consequences as that exhibited in evidence in this record.

But it is insisted that the point whether the killing was accidentally was not submitted to the jury by the instructions. This position is the result of a gross misconception of the sixth instruction already noticed. By it the jury were told if the shooting was not intentionally done, but was the result of defendant's negligence, etc. Thus, in effect, telling the jury that if the shooting was accidentally done—*vide* Webster's Dict., intentional.

It is also insisted that the statute only makes culpable negligence punishable when resulting in homicide. But such negligence as the defendant exhibited was culpable or criminal, both in the sense of the lexicographers and of the law writers.

Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing something which such a man would not do under all the circumstances surrounding such particular case. Sherman & Redfield on Negligence, sec. 87.

It was unnecessary that the instructions should contain the word "culpable;" it was sufficient that they conveyed to the minds of the jury other and equivalent words, expressive of the idea of culpability. As the instructions given for the State correctly declare the law on the subject of negligence and its punishment, it becomes unnecessary to consider other instructions asked on the same subject by the defendant.

We are not aware that any one heretofore in this State has been prosecuted for manslaughter upon similar circumstances to those which the record presents. And yet we may judge, from the reports of the daily press, instances are not unfrequent within our borders where human lives are sacrificed by playful carelessness in handling fire arms. Finding no error in the record, we affirm the judgment.

All concur.

ATTORNEY AND CLIENT — TRANSACTION BETWEEN—BURDEN OF PROVING GOOD FAITH.

MERRYMAN v. EULER.

Maryland Court of Appeals, March 8, 1883.

Where the relation of attorney and client exists, the law makes a presumption against the attorney and in favor of the client. In such cases the *onus* is on the attorney to prove the entire *bona fides* of any transaction between them.

Appeal from the Circuit Court of Baltimore City.

The case is stated in the opinion of the court.

Orlando F. Bump, for the appellant; *William J. O'Brien*, for the appellee.

IRVING, J., delivered the opinion of the court:

Upon the application of "The President and Directors of the German Fire Insurance Company of Baltimore," who held the first mortgage on the property, with assent therein to a decree the circuit for Baltimore City passed a decree against Henry Otto, the mortgagor, for the sale of the mortgaged property, and had appointed Lewis H. Robinson trustee to sell the same. It appears, that the appellee, John Euler, had the second mortgage on the property, and employed the appellant to look after his rights to the surplus proceeds, after paying the first mortgage. The property was sold, and the sale reported and ratified. Appellant filed a petition in Euler's name, asking that he be made a party defendant, and that the surplus proceeds, after paying the first mortgage, might be awarded to him. He was made a defendant by order of court. Appellant then filed Euler's claim with the interest which had accrued added.

Subsequently the appellant filed a petition in his own name, setting up an assignment from John Euler for one-half of any sum that might be awarded Euler in the case. That agreement was dated the 25th of November, 1881, (the same day on which the sale took place), and was an assignment under seal. To the allowance of this claim on the part of the appellant, the appellee objected and filed a petition asking its disallowance: 1st. "Because the same was procured from him when he was in a condition making him unconscious of what he was doing or the effect thereof." 2nd. "Because the only professional labor performed by Merryman was filing the claim of the appellee and that the said Merryman had no right to any allowance out of the funds in the trustee's hands." The court ordered testimony to be taken, upon which two audits were stated, one allowing, and the other disallowing the claim of the appellant.

The court upon the proof rejected the account allowing the assignment to Merryman, and ratified the account which disallowed it. Before finally ratifying either, however, the court offered to direct the allowance of fifty dollars for appellant's services and no more, and to have that put into the account it would ratify. This was refused by the appellant, who appealed from the order of the court ratifying the account which excluded his claim.

The court said: "The relation of counsel and client is a fiduciary one, requiring the court to scrutinize any contract between them, and upholds only such an one as is apparently reasonable and fair. The real labor in the case was performed by Mr. Robinson, the trustee, who has been allowed a fee of one hundred and fifty dollars for his services. If Mr. Merryman will take a fee of fifty dollars for his compensation, I will ratify an account making him that allowance."

Upon an examination of all the evidence in the

case, we think that the court not only took the right view of the law, but also offered Mr. Merry-may all that could possible be asked under the circumstances. There was some difficulty in respect to the title that was to be sold, because of the extinction of the leases upon the property, which required some negotiation to perfect the same. This duty, it seems, devolved on the trustee to sell, and the Court says he performed nearly the whole service rendered the parties, and ordered him paid accordingly from the proceeds of sale. It is not necessary to go more minutely into the facts. It is immaterial whether the appellee was drunk when the assignment was made or not; for it was abundantly clear that the relation of client and attorney existed; and, under under such circumstances, the law makes a presumption against the attorney and in favor of the client. In such case the *onus* is on the attorney to prove the entire *bona fides* and fairness of the transaction, which he has failed to establish to the satisfaction of the court below or to us.

In Walmesley v. Booth, 2 Atkyns, 27, Lord Hardwicke says: "There is a strong alliance between an attorney and his client and a great obligation upon the attorney to take care of his client's interest: and the court will relieve a client against the extortion of an attorney." In that case the client was plaintiff asking relief, and, as he consented that the bond should be regarded as security for what was actually due, the court said he would allow it to be so. In Newman v. Payne, 2 Ves. Jr. 200, the Chancellor lays down the same rule, and adverts to the fact that,in Walmesley v. Booth, the bond was allowed to stand as security for the actual amount due,only because the plaintiff consented to it.

All the authorities concur that the highest degree of fairness and of good faith is required from an attorney towards his client, and all their dealings will be closely scrutinized, and no contract between them will be upheld where any undue consequences result to the attorney. Weeks on Attorneys-at-Law, 441, 450, and 451; Story, Eq. Jur., secs., 312a, 312b, 312c, and authorities there collated; and Kerr on Fraud and Mistake, 151, 161, 163, 168. The attorney is supposed to have an ascendancy over the client, because of his relation to him, and can easily impose on his credulity; therefore, transactions, which would be open to no objection where no such relation exists will be held invalid as against a client. It is a rule of public policy. Gray, et al v. Emmons, et al, 7 Mich., 533; Brown v. Bulkely, 1 McCarter Chy., 14 N. J., 451. In the last cited case the learned Chancellor Green said, when a security is taken by an attorney from a client as compensation for his services, the presumption is that it is unfair, and the *onus* of proving it fair is on the attorney. In that case the court held, that the transfer would not be wholly set aside, but would be held as security for what was actually the attorney's due. Conceding, without so deciding, that, in this case, the appellant was entitled to have the assignment to him so treated, he has no ground of complaint, for the court offered to so treat it by allowing him in the accounts fifty dollars for his services, which he declined, preferring to stand on what he regarded as an assignment the court could not disregard. The court needed no further proof on the subject, and no request was made to allow more. The order of the court must be affirmed.

Order affirmed.

DEATH BY WRONGFUL ACT — PERSONAL REPRESENTATIVE—ASSETS — ADMINISTRATION.

PERRY v. ST. JOSEPH, ETC, R. CO.

Supreme Court of Kansas.

The statutory right of action for death by wrongful act is not an "asset" of the estate of the deceased. Therefore, if it is essential to the grant of letters testamentary that the deceased should either have been a resident of the county, or should have had assets therein, the grant of letters upon the estate of a non-resident who had no other assets in the county, is void.

Error from Doniphan County.

HORTON, C. J., delivered the opinion of the court:

This action was brought by the plaintiff as administrator of the estate of Susan B. Snyder, deceased, whose death was alleged to have been caused by the carelessness and negligence of the St. Joseph and Western Railroad Company, and was based upon sec. 422 of the code.

Upon the demurrer to parts of the answer filed by the defendant two questions are presented: First, whether the term "estate" as used in sec. 1, ch. 37, Comp. Laws of 1879, including a claim for damages for causing the death of the intestate under sec. 422 of the code; second, if the term 'estate' embraced assets only of the intestate, that is, property, rights of choses in action held by or belonging to the intestate at the time of her death, and which are subject to be applied by the administrator to the payment of debts, whether in an action of this character it can be shown as a defense that the probate court had no jurisdiction to issue letters of administration on the estate of the deceased. It seems to be conceded in the argument of counsel that the deceased left no estate in the county of Doniphan, unless the claim for damages for causing her death under sec. 422 may be denominated assets of the deceased, within the meaning of the statute authorizing the granting of letters of administration in this State, sec. 1, ch. 37, Comp. Laws, 1879, reads:

"That upon the decease of any inhabitant of this State letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in

any other State or country, leaving any estate to be administered within this State, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered, and the administration which shall be be first lawfully granted in the last mentioned case shall extend to the estate of the deceased within the State, and shall exclude the jurisdiction of the probate court in every other country."

Section 422 of the code provides:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed $10 000 and must inure to the exclusive benefit of the widow and children if any, or the next of kin, to be distributed in the same manner as personal property of the deceased."

In the subsequent sections of chapter 37 "estate" in sec. 1, evidently refers to and included only the goods, chattels, moneys, and real estate, rights and credits of the deceased, or in other words, the assets of the deceased. As the deceased was not an inhabitant or resident of Doniphan county at the time of her death, unless the action given by said sec. 422 is assets, the probate court of Doniphan County had no jurisdiction to issue letters of administration on her estate, or to appoint the plaintiff the administrator. Now the action given by said section is for causing the death by a wrongful act or omission in a case where the deceased might have maintained an action had she lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which died with her, remains extinct. The right of action created by the statute, is founded on a new grievance, viz: causing the death, and is for the injuries sustained thereby by the widow and children or next to kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered, is not that of the representative of the deceased, but a trustee for the benefit of the widow and children or next of kin, and the action is for their exclusive benefit. If no such person existed it could not be maintained. R. R. Co. v. Swayne's Administrator, 26 Ind. 477. The administration law of Kansas contemplates that when a person dies intestate in any other State or country than Kansas, in order to authorize the granting of letters testamentary or letters of administration, the deceased must have left an estate to have been administered within this State, and that estate must be something of a tangible nature to pay the costs and expenses of administration and the debts of the intestate in any exist. The money recovered by the administrator in an action by sec. 422 could not be used for the costs and expenses of administration or to satisfy the debts of the creditors of the deceased, and an action based upon this statute is not an "estate" or "assets" within the act respecting executors and administrators, Ch. 37, Comp. Laws of 1879, p. 408; Railway Co. v. Cutter, 16 Kansas 568.

If the deceased was not an inhabitant or resident of this State at the time of her death, and if she left no estate to be administered within this State, and none come into it afterwards, then the probate court of Doniphan had no jurisdiction to issue letters of administration on the estate of the deceased or to appoint the plaintiff her administrator, and all its acts in doing so are void in *toto*. It has been decided in many cases that admistration granted on the estate of a person not really dead is totally void. Stephenson v. Superior Court, 15, Reporter, No. 5, p. 140; Griffith v. Frasier, 8 Cranch. 23; Williams on Executors (Am. notes by Perkins,) 632, and notes to page 631.

The jurisdiction of the probate court of Doniphan county to issue letters of administration is derived from the provisions of the statute and can be only exercised under the circumstances and in the cases provided for thereby. Therefore, if the deceased not being an inhabitant or resident of of this State at the time of her death left no estate to be administered within this State and none came in afterward, that court, under the statute, had no jurisdiction to grant administration. But it is said the probate court had jurisdiction to ascertain whether as a fact the deceased left any estate in Kansas, and its judgment granting letters of administration is conclusive until revoked or reversed. Where the jurisdiction of the court is conceded, as a rule, its judgment is conclusive of all matters involved; but if the jurisdiction be disproved then the judgment is void for all purposes. Mastin v. Gray, 19 Kansas, 458, and the cases there cited. Melia v. Simmons, 45 Wisconsin 334; Moore v. Smith, 11 Rich. Law. (S. C.) 560.

Now the probate court of Doniphan County had no authority to grant letters of administration, unless the deceased left an estate in that county, and it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction; for this would be, to use a common expression, "reasoning with a circle." The probate court of that county, we suppose, assumed that the deceased had left an estate to be administered and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective, than if the probate court of Doniphan County had granted letters or administration upon her estate, when, in fact, she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the probate court rests upon the fact of an estate belonging

to the deceased in Kansas. If the defendant can clearly show that the deceased died without leaving any estate of any kind, it must result that the entire proceedings before the probate court were without jurisdiction and void. D'Arusmart v. Jones, 11 Cent. L. J. 253; Thompson v. Whitman, 18 Wall. 457; Jochemsen v. Bank, 3 Allen, 87.

It has already been decided by this court that an administrator appointed in another State or Territory can maintain an action in this State under sec. 422 of the Code, and, therefore, if the probate courts of this State have no jurisdiction to grant letters of administration upon the estate of the decedent, and the probate court of any other State has that jurisdiction the foreign administrator thus appointed can prosecute the action. Railway Co. v. Cutter, *supra*.

The judgment of the district court will be affirmed.

All the justices concurring.

CRIMINAL LAW—LARCENY — FELONIOUS TAKING.

STATE v. WINGO.

Supreme Court of Indiana, June 30, 1883.

To constitute a larceny there must be a felonious taking of the property. When property which lawfully in the custody of an employee or bailee is criminally appropriated to the use of such employee or bailee, the offense may be embezzlement, but it can not be larceny.

HAMMOND, J., delivered the opinion of the court:

This is an appeal by the State upon questions of law reserved at the trial.

The appellee was charged in the indictment with the larceny of two mules from David Pugh. There was a trial by jury and a verdict of acquittal. The evidence is in the record, and shows without conflict the following facts:

In the Spring of 1881 the appellee was in the employment of David Pugh, as a farm hand, and in hauling corn to market for Pugh to Terre Haute. On the day of the alleged larceny, in March 1881, Pugh sent him to that city with the two mules and a wagon loaded with corn, directing him to sell the corn and collect the money for it and return the same day. The appellee did not have permission to sell the mules.

On reaching the city, before selling the corn, Wm. A. Hunter met him and proposed to buy the mules. Appellee informed him that he would sell them after disposing of his load of corn. Afterward on the same day he met Hunter again and informed him that he was ready to sell the mules and drove to Hunter's livery stable. The price $250 was agreed upon, and he sold and delivered the mules to Hunter and received for them money through a check on the bank. He gave Hunter a bill of sale signed with his own name. He left the wagon and harness at the livery stable, saying that he would soon return for them.

When next heard from, he was in Kentucky. Hunter was acquainted with the appellee and with the mules, and knew they belonged to Pugh. He supposed the appellee had a right to sell them, but made no inquiry of and received no statement from the appellee as to his authority in this respect.

The attorney for the appellant requested the court to give the jury this charge: "If the jury find from the evidence that the defendant, in the year 1881, in Vigo County and State of Indiania, was in the employment of David Pugh, as servant or teamster and had in his custody the team of mules of said Pugh to haul to the city of Terre Haute a quantity of corn and on the day of said hauling was directed by said Pugh to deliver the corn in said city and return the same day with said team of mules, and that the defendant, while having the mules in his custody, as aforesaid, took and carried or drove the same to the livery stable of Foultz and Hunter in the city of Terre Haute and then and there sold and delivered the same to said Foultz and Hunter, or the Wm. R. Hunter, without the knowledge, consent or authority of said David Pugh and with the feloneous intent of then and there converting said mules to his own use, then he is guilty of larceny of said mules and you should so find."

This instruction the court refused to give, but gave the jury, at the request of the appellee the following:

1. "If the jury find from the evidence that the defendant was in the employ of the prosecuting witness, Pugh, and was working for Pugh upon his farm, and that Pugh sent the defendant to Terre Haute with a load of corn in a wagon with the mules charged to have been stolen; and that the defendant while he still had possession of the mules sold them, then he is not guilty of larceny and you should find him not guilty."

2. Larceny is the feloneous stealing, taking and carrying away of the personal goods of another. If you find from the evidence that the defendant had the possession of the mules with the consent of the owner and sold them you should find for the defendant."

3. "If the defendant had the lawful possession of the mules and sold them, then there was no such feloneous taking as the law requires in a case of larceny, and you should find the defendant not guilty."

4. "If the servant while in the employment of his master has intrusted to his care any personal property of his master, and he feloneously sells and converts the same to his own use, he is under the law of Indiana guilty of embezzlement, but is not guilty of larceny."

The refusal of the court to give the instruction asked by the State, and the giving of those requested by the appellee were duly excepted to by

the appellant's attorneys, and these rulings are assigned for error in this court.

The principle is well settled that to constitute a larceny there must be a felonious taking of the property. When property, which is lawfully in the custody of an employe or bailee, is criminally appropriated to the use of such employe or bailee, the offense may be embezzlement, but it cannot be larceny.

Kelly v. The State, 14 Ind. 36; Hart v. The State, 57 Ind. 102; Murphy v. The State, 63 Ind. 223; Slack v. The State, 63 Ind. 285; Jones v. The State, 59 Ind. 229; Moorse's Crim. Law Sec. 918. The evidence shows that the appellee was intrusted with the property by the owner. There is no evidence that he used fraud in procuring posession of it. Nor is there any evidence of a criminal intent, until after he arrived in the city. The criminal purpose probably entered his mind for the first time when Hunter proposed to purchase the mules. There was an entire absence of proof of a felonious taking of the property.

As the possession of the servant is the possession of the master, it may be that in the absence of a statute upon the subject of embezzlement, the evidence in this case would authorize a conviction for larceny. 2 Bishop Crim. Law, secs. 853 856; 2 Wharton's Crim. Law, sec. 1840.

But the evidence clearly brings the appellee's act of converting to his own use his employer's property within the provisions of the embezzlement act of March 21, 1879, which was in force when he committed the wrong complained of, Acts Special session 1879, p. 126.

This act was later than the one then in force relating to larceny, and it can hardly be thought that the legislature intended to make the same act criminal under different statutes, defining separate offenses.

The rule is familiar that a statute so far as it covers the same subject matter of a former statute, repeals the previous enactment by implication.

Our conclusion is that the court below did not err in refusing the instruction tendered by the State, nor in giving those requested by the appellee.

The appeal is, therefore, not sustained.

WEEKLY DIGEST OF RECENT CASES.

1. CONTRACT—REAL ESTATE AGENT'S COMMISSION—STATUTE OF FRAUDS.

A contract to procure a purchaser for real estate is valid without being in writing. A real estate broker is entitled to his commission when he finds a purchaser ready, willing and able to complete the purchase on the terms given to the broker by the owner. If the owner then refuses to sell the property on the terms offered, or declines doing so for so long a time that the proposed purchaser buys other property, and refuses thereafter to buy on the terms offered, the broker can recover his commission. *Fischer v. Bell*, S. C. Ind., June 23, 1883.

2. CONTRACT—STIPULATED PRICE—QUANTUM MERUIT.

G entered into a written contract with S, whereby he agreed to pay S the sum of $135 if he would paint his house in a proper and workmanlike manner, with the best materials, and one-half that sum in case the house should not be painted as aforesaid. *Held*, that S can not recover upon a *quantum meruit*, G having paid $67 50 and the work not having been done as first specified in the contract. *Ginther v. Shultz*, S. C. Ohio Com., June 5, 1883; 3 Ohio L. J. 660.

3. CORPORATION—PREFERRED STOCK—MORTGAGE—PRIORITY.

Certificates of preferred stock of the Ohio & Mississippi Railroad Company were issued, containing the following language: "The preferred stock is to be and remain a first claim upon the property of the company after its indebtedness, and the holder thereof shall be entitled to receive from the net earnings of the company 7 per cent. per annum, payable semi-annually, and to have such interest paid in full, for each and every year, before any payment of dividend upon the common stock; and whenever the net earnings of the corporation, which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of 7 per cent. on the preferred stock in full, and 7 per cent. dividend upon the common stock, for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments, shall be divided upon the preferred and common shares equally, share by share." *Held*, that the preferred stockholders had no claim on the property superior to that of creditors under debts contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one to a priority over the holders of common stock. *Warren v. King*, U. S. S. C., May 27, 1883; 2 S. C. Rep. 789.

4. EVIDENCE — COMMUNICATIONS WITH LAWYER—EXCEPTIONS TO THE RULE—TRUSTS.

No privilege can be claimed by a trustee, as against his *cestui que trust*, for letters passing between the trustee and his solicitor relating to the trust, before action brought. *Re Mason; Mason v. Cattley*, Eng. H. Ct., Ch. Div., 48 L. T. 631.

5. EVIDENCE—PRIVILEGE—COMMUNICATIONS WITH COUNSEL.

It is a common thing in this country for a party wishing to convey his property, to seek the advice of an attorney, and for the attorney not only to give advice, but to act as conveyancer in the preparation of the deed. Communications made by a client to his attorney thus employed relating to the subject-matter about which and for which advice was thus sought, are just as confidential and just as much privileged as if they were made in reference to a litigation existing and in progress at the time. *Crane v. Barkdoll*, Md. Ct. App., March 8, 1883; Reporter's Advance Sheets.

6. HUSBAND AND WIFE—DISCHARGE OF HUSBAND IN INSOLVENCY—JOINT NOTE.

The discharge of a husband under the insolvent laws does not operate to discharge the wife from her obligation to pay a promissory note, of which she and her husband were the makers. *Allers v. Forbes*, Ml. Ct. App., February, 1883; Reporter's Advance Sheets.

7. LIEN—ACCOUNTING—LIEN HOLDER IN POSSESSION.

J. W. S. under an agreement with a railroad company, leased a lot of ground from the company at an annual rental of $250 and erected thereon a railroad hotel. He assigned the lease to his wife, N S. Subsequently, J W S, N S, and the company agreed that the lease should be determined, and that the amount to be paid by the company to N S, for the improvements should be submitted to arbitrators, whose award should be entered as a decree of the chancery court of the county where the land was situated. The arbitrators awarded N S $31,666.66, which was entered as a decree, and the railroad company refusing to pay that amount or take possession of the property, a bill was filed to enforce it. It was agreed that the amount of ground rent due from N S, to the company, which had not been taken into account in making the award, should be deducted from the amount due from the company. On appeal to the Supreme Court of the State, it was decreed that $31,666.66 was due from the company, and this amount, with interest from a day named, should be a lien on the property; and that the railroad company should take possession on such day. The company failing to satisfy the decree, an execution was issued to collect the full amount of the decree, with interest, whereupon the company filed a bill to enjoin the collection of the full amount, and to compel the allowance of credits for the amount of ground rent due and the rents and profits of the property which had remained in the possession of N S. The case being removed to the United States court, a decree restraining the collection of $20,000 of the amount, and requiring N S to give a refunding bond for the repayment of any sum which might finally be decreed against her was passed. The company paid the marshal $19,217, and filed a bill of interpleader, averring that one J H V claimed to have a lien on the decree, and brought into court the balance of the decree not enjoined or paid to the marshal, making J H V and N S parties defendant. It appeared that J H V had a mortgage on the property, executed by N S and J W S which the Supreme Court of the State had decreed was a valid lien on the income of the property. *Held* (1) that N S was liable to account for the rents received by her, and for a reasonable rental during the time the premises were actually occupied by her; (2) that the amount due J H V on his note and mortgage should be paid out of the balance of the fund due from the railroad company to N S. *Mathews v. Memphis etc. R. Co.*, U. S. S. C., April 30, 1883; 2 S. C. Rep. 780.

8. NOTICE—DELIVERY OF LETTER TO LETTER CARRIER.

In notifying the indorsers of a note of the dishonor thereof, the delivery of a letter to an official letter carrier of the United States while making his rounds, is the full equivalent for depositing it in a receiving box or at the post office. *Pearce v. Langfit*, S. C. Pa., Dec. 30, 1882; 13 W. N. C. 184.

9. PARTNERSHIP—EXECUTION OF CONTRACT.

An agreement in writing between "W, superintendent of the Keets Mining Company, parties of the first part, and P, party of the second part," by which "the said parties of the first part" agree to deliver at P's mill ore from the Keets mine (owned by the company) to be crushed and milled by P, and signed by "W, Supt. Keets Mining Co.," and by P, is the contract of the company. An order sustaining a defendant's demurrer and giving the plaintiff leave to amend, does not preclude the plaintiff from renewing, or the court from entertaining, the same question of law upon the subsequent trial on an amended complaint. *Post v. Pearson*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 799.

10. PARTNERSHIP—NON-TRADING FIRM—POWER TO BIND BY NOTE.

A firm composed of Thatcher, Webster and Ellison, were engaged in the insurance, real estate and collecting business, in Kansas City. Webster, either directly by himself, or indirectly by others, purchased lumber of said decedent, Deardoff, on the credit of said firm, without the knowedge of Thatcher and Ellison, and Deardoff sold the same on the credit of the firm without any knowledge on his part that it was not being bought and applied for the purposes of the firm. The note sued on was executed by Webster in the firm name for this lumber, and without the knowledge or consent of the other members of the firm. Plaintiff recovered judgment. *Held*, that partners engaged in trade, have an authority implied by law to bind each other by commercial paper, executed in the firm name; partners in other business have no such *prima facie* authority; but the presumption against the lack of authority may be rebutted by showing that the organization and particular purposes of the firm are such as to render it necessary, or usual in similar cases. One partner in a non-trading partnership can not bind his co-partners by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his co-partner, or unless the giving such instrument is necessary in carrying on the firm business, or is usual in similar partnerships, and the burden is upon the holder of the note, who sues upon it, to prove such authority, necessity or usage. *Sherer v. Thatcher*, S. C. Mo.

11. PATENT—REISSUE—INFRINGMENT.

If a patent containing a single claim for a combination of several elements is, within four months before its expiration reissued and extended, with the same description as before, but with two claims, the one a repetition of the original claim, and the other for a combination of some of the elements only, the reissue is invalid as to the new claim and valid as to the other. *Gage v. Herring*, U. S. S. C., May 7, 1883; 2 S. C. Rep. 819.

12. REAL ESTATE—ESTATE IN FEE SIMPLE—CREATION OF BY WILL.

Estates in fee are devisable descendable. He that hath an estate that he can will to whom he pleases, or, if he makes no will, will descend to his heirs at law, assuredly hath a fee. Descent and the power of devising are the two important requisites of such an estate. To reduce it to a less estate some restriction must be imposed on these important privileges. It is a common practice where the income of the estate is large for the testator to limit the expenditure during minority, and some times

longer in a fee simple devise; and such restriction has never been held to change the character of the devise. Estates will be held to be vested wherever it can fairly be done without doing violence to the language of the will; and to make them contingent, there must be plain expressions to that effect, or such intent must be so plainly inferrible from the terms used as to leave no room for construction. *Fairfax v. Brown*, Md. Ct. App.; 10 Md. L. Rec. No. 17.

13. TRADE MARK—DEFINITION.

The complainants, who have the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels, bottles and other devices which designate the preparation as of their own manufacture, allege that the defendants are engaged in manufacturing and selling certain essences, oils and extracts which, they represent can be so manipulated and used as to produce a good imitation of Hostetter's Bitters; that they sell the same to compounders and jobbers, with instructions to the purchaser as to the mode of compounding the bitters and selling them as the genuine articles; and that such purchaser compounds the essence and sells the bitters made thereby to retail dealers, and the latter procure the second-hand empty bottles that have been sold by the complainants, having the lables thereon, and refill them with the bitters compounded from the defendants essences and palm them off upon the public as the genuine bitters of the complainants' manufacture. *Held*, That as "Hostetter's Bitters" was the name given to a new article, and not a word of device adopted by a manufacturer or vendor to distinguish his production from other productions of the same article, it is not a trademark; and the complainants having neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell bitters by the name of Hostetter's Bitters, an injunction will not lie against defendants, except it be proven in addition that they were engaged in a scheme to put upon the market and palm off upon the public a preparation of their own as the complainants' preparation, even though it be not shown that they had sold the preparation themselves. *Hostetter v. Fries*, U. S. C. C., S. D., N. Y.; 23 Daily Reg. 1125.

RECENT LEGAL LITERATURE.

WOOD ON NUISANCES. A Practical Treatise on the Law of Nuisances in the Various Forms including Remedies therefor at Law and in Equity. Second Edition. Carefully Revised by the Author, H. G. Wood. John D. Parsons, Jr. Albany, N. Y. 1883.

The first edition of this work, published some eight years ago, met with a very favorable reception from the profession, and speedily became well known as the only text-book treating the subject exhaustively. This fact, together with the further circumstance of the rapid increase in the volume of litigation upon that topic in recent years, have afforded to it a wide field of usefulness. The book is well written, and the treatment of the various branches of the topic is generally very satisfactory. The work is marred, however, by the lack of the common convenience of a table of contents, and in the second edition liberal additions are made to the text, and the numbering of the sections is altered. For this there is no possible excuse, and the only result will be a confusion of citations, except where special pains is taken to specify which edition is referred to. The added sections might easily have been designated by the number of the last preceding section with the additien of an alphabetical designation, as has been done in many standard works. It may be uncharitable to say so, but the conclusion is forced upon us that the method adopted is simply a book-making device to increase the value of the second edition by rendering the copies of the former edition of as little value as possible.

ADDISON ON CONTRACTS. Being a Treatise on the Law of Contracts. By C. G. Addison, Esq. Eighth Edition. By Horace Smith, of the Inner Temple, Barrister at Law. With American Notes by Benjamin Vaughn Abbott, Two Volumes. Boston, 1883: Soule & Bugbee.

This is a standard work too well known to the profession to require specific description. There some are points of excellence in the present edition worthy of notice. It is reprinted from the eighth English, which, when compared with former English editions, shows large additions, estimated at nearly forty per cent. The explanations given by Mr. Horace Smith, the English editor, in his preface to the eighth edition, shows that he has added nearly two thousand cases, and that the work in its new form, exclusive of indexes, etc., is lengthened about two hundred pages, notwithstanding much condensation of former matter. The increase value of such an edition over former ones is manifest. It is also manifest that very large additions in the shape of American notes could have been made without enlarging the work to three volumes. Wherever the American reader is in danger of being mised by lAddison's text the American editor has interposed explanatory notes. For the judiciousness of such annotation Mr. Abbott's name is,we take it, an abundant guaranty. The paper, binding and press work are very handsome.

A HISTORY OF THE CRIMINAL LAW OF ENGLAND. By Sir James Fitzjames Stephens, K. C. S. S., D. C. L, a Judge of the High Court of Justice, Queen's Bench Division. In three volumes. London, 1883: Macmillan & Co.

The accumulation of knowledge by means of the modern microscopic method of martyrdom, soon enders great subjects unwieldy and difficult to handle as a whole. Several attempts have been made to write a complete history of the English law. The great work of Reavis, as it stood before Mr. Finlason commenced tinkering at it, was, and probably still remains, the best exposition of the growth of its principles and procedure. In the

volumes now before us Mr. Justice Stephens has related the history of but one great department of English law—the criminal law and procedure, strictly speaking. The criminal law as a whole has no history, because it has no unity. It is like a building whose parts have been erected at different times, in different styles, and for different purposes. Each part has a history of its own which begins with its foundations and ends with its completion, but the whole has neither history nor unity. Two methods are thus presented for relating the history of the whole. Either an account of each successive change may be given in the order of time, or the history of each part may be told uninterruptedly. Our author has chosen and pursued the latter method as being the least objectionable.

After giving an account of the Roman criminal law, the substantive law and criminal procedure of the English before the conquest, and of the various courts, he proceeds in successive chapters to describe the history of the procedure for the apprehension, examination and committal or bail of a suspected person; the history of the various forms of accusation and trial, especially trial by jury; the history of the development of the trial by jury; the history of legal punishment; of the management of prosecutions; the theory of criminal responsibility; the leading points in the history of the law of crimes considered as a whole, and a history of the different classes of offenses into which the criminal law is divided.

In the striking pages of the State Trials is to be found the true constitutional history of England, and it is there that our author has gone to find the successive steps through which it has come to its present condition. From the vast mass of material laid under contribution, he has witnessed many curious traces of surviving institutions, which, like the fossils of the earth, tell of a long past society.

The chief merit of the book, as a history, probably lies in the chapters on treason, libels, conspiracies, blasphemy and seditions offenses.

We would call particular attention to the expositions of the law of treason. Mr. Justice Stephens has studied this question with great interest and has undoubtedly given a clear and more intelligable account of their development than any other legal writer. Some of his conclusions are novel and of great value and importance. For instance the view taken of the present state of the English law of blasphemy. The essence of the crime is popularly supposed to be in the manner and not in the matter, and to this effect Mr. Justice Worth charged the jury in the Freethinker case. But a different conclusion is reached by our learned author. "To say that the crime is in the manner and not in the matter, appears to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony in the temper of the times." Probably the most interesting chapter in the book is that which deals with criminal responsibility.

It is impossible in the very limited space allowed us to do more than call attention to what appears to us the most important parts of these very valuable volumes, and to urge the earnest student who seeks to drink at the fountain heads of criminal jurisprudence to read and ponder the lessons therein taught. The proper administration of the criminal law is one of the vital questions of the day. It is evident to all careful observers that the public at large, have, in a very great measure, lost confidence in our criminal courts. "Something is rotten in the State of Denmark." A radical reform is inevitable. Whether this reform will prove effectual will depend upon whether the subject is considered with due regard to the lessons taught by the past. We earnestly hope and believe that this work will be conducive to a more careful and philosophical consideration of the momentous questions upon which it treats. C. B. E.

LEGAL EXTRACTS.

THE DEFINITION OF BLASPHEMY.

On April 25 and 26 the case of Regina v. Ramsay and Foote was tried in the Royal Courts, before the Lord Chief Justice of England (Lord Coleridge) and a special jury. In the course of his summing up, the Chief Justice said: Now, you have heard with truth, that these things are according to the old law, or the *dicta* of the old judges, undoubtedly blasphemous libels, because they asperse the truth of Christianity. But, as I said on the former trial, for reasons I will explain presently, I think that these expressions can no longer be taken to be a true statement of the law of the present day. It is no longer true in the sense in which it was so when these *dicta* were uttered, that Christianity is part of the law of the land. At the time those *dicta* were uttered Jews and Nonconformists, and others under disabilities for religion were regarded as hardly having civil rights. Everything almost, short of punishment by death, was enacted against them, not indeed, always by name; and thus the exclusion of Jews from Parliament was in a sense by accident (though, no doubt, if anybody had supposed that they were not excluded a law would have been passed to exclude them), but historically, and as a matter of fact, such was the state of the law. But now, so far as I know the law, a Jew might be Lord Chancellor—certainly a Jew might be Master of the Rolls—and but for the accident that he took the office before the Judicature Act, came into operation, the great and illustrious lawyer, whose loss the whole profession is deploring, would have had to go circuit, and might have sat in a criminal court to try such a case as this; and he might have been called upon, if the law be really that 'Christianity is part of the law of the land,' to lay it down as the law

to the jury, some of whom might have been Jews; and he might have been bound to tell them that it was an offense against the law, as blasphemy, to deny that Jesus Christ was the Messiah—a thing which he himself did deny, and which Parliament had allowed him to deny, and which it is just as much a part of the law that any one may deny as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of an aspersion on the truth of Christianity, *per se*, on the ground that Christianity is—in the sense in which it was said by Lord Hale, or Lord Raymond, or Lord Tenderden—part of the law of the land is, in my judgment, a mistake. It is to forget that law grows; and that though the principles of law remain, yet (and it is one of the advantages of the common law) they are to be applied to the changing circumstances of the times. Some may say that this is retrogression; but I should rather say that it is the progression of human opinion. And, therefore, merely to discover that the truth of Christianity is denied, without more, and to say that thereupon a man may be indicted now for blasphemous libel, is, as I venture to think, absolutely untrue; and I, for one, will not, until it is authoritatively declared to be the law, lay it down as law; for, historically, I cannot think that I should be justified in so doing, since Parliament has enacted laws which make that old view of the law no longer applicable; and it is no disrespect to the older judges to think that what they said in one state of things is no longer applicable now that it is altered. It is clear to my mind that the mere denial of the truth of the Christian religion is not enough to constitute the offense of blasphemy. But no doubt, whether we like it or not, we must not be guilty of anything like taking the law into our own hands, and converting it from what it really is to what we may think it ought to be. I must lay the law down to you as I understand it and as I read it in the books of authority. Mr. Foote, in his very able speech, spoke with something like contempt of 'the late Mr. Starkie.' He did not know Mr. Starkie; he did not know how able and good a man he was. He died when I was young; but I knew him, and everybody who knew him knew that he was a man, not only of a remarkable power of mind, but a man of very liberal opinions, and, if ever the task of law-making could safely be left in the hands of any man, it might have been left in his. But, what is more material, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law, and I will read it as containing in my view a correct statement of it: 'There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions; yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects; but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon those discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing a mischief, must in general, tend to the advancement of truth and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so so long as they are honest ones, justly considering that society are more than compensated for the partial and limited mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and truth from the exertions of free and unfettered minds. It is mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations, or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong' (Starkie on 'Slander and Libel,' 4th Edition, p. 599). And there is a passage in the book which appears to have been taken from Michælis, in which it is pointed out with some truth that in one view the law against blasphemous libel may be for the benefit of the libellor himself, who otherwise may encounter popular vengeance. The chief justice quoted the passage, and stated that the principle of the law as laid down by Starkie; and that he was not satisfied that the law was laid down differently by a study of the cases. He proceeded to refer to Rex v. Taylor, Venty, 293 before Lord Hale; Rex v. Woolston, Str. 834, better reported, as the chief justice said, in Fitzgibb. 64, before Lord Raymond; and Rex v. Waddington, 1 B. & C. 26, before Lord Tenterden, Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Best. After referring to the passages cited by one of the defendants from various writers, the Chief Justice concluded: What he has to show is, not that other persons were as bad, but that he is not bad—not that others are guilty, but that he is not so. It is no defense for him to bring forward cases some of which, I confess, I can not distinguish from his own. It is not enough to say that these persons have published blasphemy, if they are not brought before us. I not only admit, but feel, that, if laxity in the administration of the law is bad, the most odious form of laxity is a discriminating

laxity, which lays hold of particular persons, and does not lay hold of others liable to the same censures. But that has nothing to do with this case. The case is here; and, whether or not other persons ought to be where the defendants stand the question is, What judgment should be passed upon them? We have to administer the law, whether we like it or not. It is undoubtedly a disagreeable law to administer; but I have given you reason for thinking it is not so bad as has been supposed. It is just that persons should be obliged to show some respect for those who differ from them. You will see these publications; and if you think they are permissible attacks on the Christian belief, you will find the defendants not guilty, but if you think that they do not come within the largest and most liberal view of the law as it exists, then, whatever may be the consequences,and how ever little you may like them,it is your duty to find them guilty. It is your duty to administer the law as you find it,and not to strain it on one side or the other—certainly not to strain it in the defendants' favor, however you may think that they ought not to have been prosecuted still less to strain it against them because you may not agree with the sentiments they avow. Take the publications in your own hands, and say whether the defendants are guilty. As to the cartoons, the excuse is that they are not attacks upon, or caricatures of Almighty God. Mr. Foote declares that if there be such a Being, He is the proper object of reverence and awe; but that these are only his mode of holding up to contempt and ridicule what he considers the caricature of God exhibited in the Hebrew Scriptures. You will look at them, and judge for yourselves whether or not they come within the law, and whether or not the defendants are guilty of publishing blasphemous libels.—In the result the jury were unable to agree, and were discharged.—*Law Journal.*

NOTES

——The question of the morality of the opera bouffe recently came up in the Recorder's court of Montreal and drew some very condemnatory remarks from the learned occupant of the bench. His observations were inspired by a respectably dressed young student named Vaillaincourt being arraigned for creating a disturbance in the gallery of the Academy of Music one night. This reprehensible practice is very common there by students who assemble nightly *en masse* among the "gods," and is much complained of by the audience below. The manager of the theatre made an attempt to put an end to the annoyance by arresting one of the disturbers. The acuteness, however, of the prisoner's lawyer completely turned the tables on the manager, who witnessed the prisoner's discharge without a penalty and heard a homily from the court against the Academy company for allowing an immoral opera to be performed in the house. It appeared from the advocate's address, which was supported by the evidence adduced, that the opera announced for the night was "Carmen." "La Perichole," an admittedly immoral composition, was substituted at the last moment for the one on the bills, which belonged to an unobjectionable standard. The lawyer, seeing the loophole, raised the plea that the accused had a right to object to the performance, and put ten witnesses, fellow-students, into the box, all of whom condemned the opera as highly immoral. The court took the same view, and said that it was clearly proved that an immoral play had been substituted for a pure one, and that, therefore, those present had a perfect right to express their disapproval. He went on to say that if he chanced to be present where such a change in the plays had been made he would think himself perfectly justified in rising and hissing and acting in any manner he thought fit to express his disapprobation. The Academy of Music Company, he said, forfeited all right to protection from the law when they allowed such plays to be produced in their theatre. He accordingly dismissed the case.—*Toronto Mail.*

——A judge full of caustic humor and shrewd common-sense, and remarkable for the brevity of his judgments and the rapid decision with which he was wont to cut the much entangled knots of litigation, was Sir Samuel Martin, Baron of the Exchequer, whose death at the age of eighty-two was almost simultaneous, by curious coincidence, with the recent opening of the new law courts of London. In a certain case he once summed up as follows, after a mass of contradictory testimony and long speeches by counsel: "Gentlemen of the jury,you have heard the evidence and the speeches of the learned counsel. If you believe the old woman in red, you will find the prisoner guilty; if you do not believe her, you will find him not guilty." He had a thorough hatred for interpreters in court, and once, when a Spanish sailor was being tried and the interpreter was particularly unskillful, he exclaimed; 'Mr. Interpreter, tell the prisoner that he has got Mr.—— to prosecute him and Mr.——to defend him, and that I am the judge, and this is the jury that will try him." This having been conveyed to the prisoner, the Baron continued: "Now, Mr. Interpreter, stand down," and tried the whole case in English, pure and simple. Baron Martin's career was full of mercy and kindness as well as justice, and he left the bench a few years ago crowned with the respect and love of all who knew him. Apart from a growing deafness, his physical and intellectual faculties remained unimpaired until within three days of his death.

——A lawsuit to determine the ownership of a large meteroric stone whith recently fell in Emmet, Ia., is about to be tried. The owner of the land on which it fell claims that it is his for that reason, and the man who saw it fall and dug it up believes the court will hold his title perfect. The stone has considerable value, for it weighs 600 pounds,